JAMES H. MCKENNEY, Clerk.

Brief for Pl'ffs in Err.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Filed Feb. 27, 1897.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiffs in Error,

vs.

SEBERTE O. FREEMAN AND OTHERS,

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Plaintiffs in Error.

C. W. BUNN,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 241.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiffs in Error,

vs.

SERETTE O. FREEMAN AND OTHERS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a case for damages for death resulting from collision at the grade crossing of a public highway and a railway track. The defendants in error recovered a verdict and judgment of $9,000 for the death of T. A. Freeman. The action was brought in the Circuit Court of the United States for the District of Washington. The judgment was affirmed on writ of error by

the Circuit Court of Appeals for the Ninth Circuit, Judge Ross dissenting (48 U. S. App. 757). There were two main points in the action as it stood in the Circuit Court; (a) whether the defendant was guilty of negligence in failing to blow a whistle and ring a bell to give notice of the approach of the train to the crossing; (b) whether Freeman, the deceased, who was driving a team on the highway, contributed to the accident by his own negligence. The evidence was in conflict as to the negligence of the railway company and the verdict of the jury must be regarded as having settled so far as the discussion here is concerned, that proper signals were not given by the employes of the defendant. But the evidence was not in conflict as respects the negligence of the deceased. That question as we shall show is one of law and has been brought to this court by proper exceptions. It constitutes the first and leading question to be considered. There is one other question in the case involving the correctness of the instructions to the jury on the subject of damages.

The accident happened on the 20th day of April, 1895, during the operation of the Northern Pacific Railroad by a receiver appointed by the federal court. The action was brought against the receiver and afterwards on the discharge of the receiver was continued against the Northern Pacific Railway Company, purchaser at foreclosure sale, which by virtue of provisions in the

decree of sale had assumed the liabilities of the receiver.

The deceased was passing along a wagon road near the town or village of Elma in the state of Washington, which wagon road crossed the railroad track at nearly right angles. The railroad track was in an excavation, eight feet below the surface of the surrounding country, and the wagon road approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of an approaching train was shut off by the banks of the cut in which the railroad was laid and by trees; but 40 feet before reaching the track the highway emerged from the cut and the view up the track for 300 feet and more was wholly unobstructed.

The deceased was driving a team hitched to a wagon and was moving at a slow trot toward the railroad crossing; he was a man 30 years of age, his sight and hearing were good and he was familiar with the crossing, having frequently driven the same team over it. The team was gentle and accustomed to the cars. This brief statement of the facts cannot be disputed and is taken substantially from the opinion of the Circuit Court of Appeals.

A bill of exceptions was signed and made a part of the record; it is certified to contain all the evidence. At the close of the testimony the defendants requested the court to direct a verdict in their favor on the ground that the undis-

puted testimony showed the deceased to have been guilty of contributory negligence. Exception was taken to the refusal of the court to direct a verdict, also to certain instructions of the court touching the negligence of the deceased, and to one instruction of the court upon the measure of damages.

ASSIGNMENTS OF ERROR.

1. The court erred in refusing to give the following instruction asked by the defendants:

> "On the evidence in this case your verdict must be for the defendants." (Transcript, p. 132.)

2. The court erred in giving the following instruction to the jury:

> "Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you, and if you believe from the evidence that the deceased, Thomas A. Freeman, acted and did as a man of ordinary care and prudence would have done as he approched the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent, and that the collision was due to their negligence." (Transcript, p. 132.)

3. The court erred in giving the following instruction to the jury:

> "There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable caution and care to avoid the collision." (Transcript, p. 132.)

4. The court erred in charging the jury that damages for the death of the deceased might include "the loss to the wife and children because of being deprived of the use and comforts of his society." (Transcript, p. 133.)

ARGUMENT.

I.

The first three assignments of error will be considered together.

A plat of the ground inserted in the transcript in front of page 153 shows the geography of the accident. The railroad runs approximately north and south, the highway east and west.

The train was coming from the south, Mr. Freeman with his wagon was coming from the west. Points marked "1" and "2" on this diagram are respectively in the center of the highway 40 feet westerly of the railroad crossing and in the center of the railroad track 300 feet south from the center of the highway. In connection with this map the photographs on the two preceding sheets of the transcript should be considered (defendants' exhibit 1 and 2). One is taken with camera in center of railroad track 300 feet southerly from center of road crossing. It shows a view of the road crossing and of a man standing in center of county road at point 1, that is 40 feet west of the crossing. Width of railroad cut varies from 80 to 85 feet. The other photograph is a view taken with camera at point 1, that is in the center of the highway 40 feet west of railroad crossing. It shows down the track a freight train of which 6 or 7 cars are plainly visible. The front end of the caboose is 300 feet and the rear end about 286 feet from the center of the road crossing.

These views we submit ought completely to dispose of the case. The evidence shows that they were taken January 7, 1896, something over a year prior to the trial and about 8 months after the accident. The evidence is also conclusive that there had been no digging or excavation in the meantime and that the ground was in the same condition as when the accident occured, saving that some bushes had been cut away from the

top of the bank about 300 feet from the highway; these bushes could have no effect on the views shown in the photographs, or to cut off the train from the view of deceased *at or inside* of the point where he was forty feet from the track.

The photographs demonstrate that at a point 40 feet from the railroad in the center of the highway the deceased had a perfectly unobstructed view down the track in the direction from which the train was coming for over 300 feet. Now all the testimony shows that the deceased was driving on a slow trot, moving say 4 or 5 miles an hour. The speed of the train is not in dispute, and that was somewhere from 14 to 20 miles an hour. If the train was moving 16 miles an hour and the deceased 4 miles an hour, the train was 160 feet from the deceased when he came to that point in the highway shown in the photograph 40 feet from the crossing, and it was in full view. If the deceased was travelling 3 miles an hour and the train moving 18 miles an hour, the train was 240 feet from the crossing when the deceased arrived at the point referred to, and was in full view. Upon any possible supposition admissible under the evidence, as to either the speed of the train, or of the deceased, he had an unobstructed view of the train when he came to the point 40 feet from the track where the man is standing in photograph 1. Disregarding all the testimony of eye-witnesses as to how the accident happened, these photographs demonstrate that either the deceased did not look, or that if

he did look he tried to pass over the crossing ahead of the train. And either supposition is equally fatal to the plaintiff's case.

It is immaterial under the authorities and under any rational view, that the deceased could not have seen or have heard the train at some point or points farther than 40 feet from the crossing. That his view was obstructed at such points may safely be conceded. If his view was obstructed it was all the more his duty to look as soon as he came to the point 40 feet or more from the track where his vision became unobstructed. If he had looked there he would have been safe, for with gentle horses, a point 40 feet from the railroad was a point of safety.

But sufficient as this demonstration is, the defense did not rest upon it entirely. There were three eye-witnesses of the accident, all called by the defendants. First, Mabel Wakefield, a girl ten years of age, who with two other children was in the highway on the west side of the track, about 130 to 150 feet distant from it. The deceased passed her and the other children as he drove toward the track and spoke to them. She watched him until the collision occurred; says he was driving at a slow trot, looking at his horses and team; that he drove at about the same trot all the time; that she did not see him look either way, and that when the horses were right close to the track, when the train was right close to him, she saw the horses pull back and

try to turn away from the train. "He was coming down in a slow trot, and when he saw the train then he tried to pull his horses around, just like that (indicating);" then the train struck the wagon. "Why, you know, they were going down the hill at a slow trot, and just then Mr. Freeman saw the train, and the horses saw the train, too, and they tried to get up in that place between the fence and the track;" she says that they turned pretty suddenly; that the train was right there by him when the horses first turned; that when the horses turned, the engine was right across the road; that she saw the horses turn and saw the engine at the same time; that the horses were about 6 feet from the train when they turned. (Transcript, p. 80–88).

Mrs. Minnie Kennedy and Mrs. McDowell were on the opposite side of the track in the wagon road, walking and looking toward the deceased. They were about 200 to 250 feet away. They testified that the team was approaching at a slow trot, that its speed was uniform up to the time of the accident; that the deceased looked straight before him without turning his head either way, and that the team trotted right down on to the crossing; that he did not look in either direction or make any move to stop until just as the locomotive struck him. (Transcript p. 88-97.)

In the opinion of the learned Circuit Court of Appeals the testimony of the Wakefield girl is treated as if it conflicted with the testimony of the two women and as if it furnished good

ground for the jury finding that the deceased looked and listened for the approaching train. The court bases this upon the fact that the Wakefield girl testifies to having seen the horses when almost on the rails and when the engine was on the crossing, shy or jump off to the left, as if to evade the engine. But this view seems clearly erroneous. If the deceased had tried to turn his horses 40 feet from the track, or had stopped there where the train was in view, and the horses had gotten away from him and ran on to the track, the case would be an entirely different one. But the testimony shows that the horses were kind and gentle and that they were all the time under the control of the deceased until just as the engine struck them, and that they did not stop, nor did the deceased look either way until they were substantially on the track. If the deceased had looked when he came in view of the train his horses' heads would have been 30 feet from the track, and with a safe and gentle team there is no reason for supposing that such a position would not have been one of safety; at any rate the jury could not speculate on what might have occurred in that case. The facts conclusively proved here are that the deceased did not look and did not see the train until just as the collision occurred. This is not only proven by the three witnesses but can be demonstrated from the measurements and photographs.

This testimony is further corroborated and the

conclusion strengthened by other testimony in the case. For example, Mr. Bridges, a witness for the plaintiffs, who examined the ground after the accident testified that the track of deceased's wagon diverged from the beaten road "above the crossing, above the planking on the crossing;" that this divergence was made by the engine striking the wagon and the tire of the wagon cutting into the ground. (Transcript, p. 33-34.) Mr. Sommers, another witness for plaintiffs, testified, "The horses had shied out a little to one side and the engine had struck the wagon and knocked it off the ground. The horses had shied out, just like horses will when they saw the engine a coming, and the wagon was throwed to one side of the track when it was hit. There where they had jumped to one side they had scraped up the ground where they struck. They was off to one side of the cattle fence—had got part way across probably. They had jumped clean across and the engine had struck the wagon somewheres about the middle; it was part way across."

Q. How far back was it where the horses had commenced to shy off?

A. Six or eight feet back from the side of the track. There was the track where the horses had shied off and the wagon cut into the ground.

Q. How far back do you think the wagon left the main-traveled portion of the road where you say the tracks showed it had left?

A. Well, it was a little more than six or eight

feet, maybe, where they had shied off. That was where the horses took right onto the track to go across. It looked like they had jumped out of the way of the engine first and then had jumped right across in front of it, across the track and onto the other side. (Transcript, p. 42-43.)

The testimony explains why the engineer did not see the deceased until the latter was just about upon the crossing. The engineer was looking out ahead, but his position being on the right side of the cab and the deceased approaching the track from the left side, the view of the engineer was cut off by the front end of his engine. The fireman whose position was on the left side of the engine was putting in coal.

The train was a regular freight train and was on time.

In the case of *Railroad Company v. Houston*, 95 U. S. 697, a woman on foot was injured by collision with a train, and this court said:

> "She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to

> pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." (p. 702.)

In *Schofield v. Chicago, Milwaukee & St. Paul Ry. Co.*, 114 U. S. 615, the court re-affirmed the Houston case quoting with approval the language which we have referred to, and further said, "in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision."

This language is referred to with approval in the case of *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 366.

The cases where this court has held the injured party not conclusively to have been guilty of contributory negligence are readily distinguishable.

In *Continental Improvement Co. v. Stead*, 95 U. S. 161, the train was a special train; the plaintiff was following another wagon and in approaching the track could not see a train coming from the north by reason of the cut and intervening obstructions. The plaintiff looked to the southward from which direction the next regular train was to come; his wagon produced much noise as it moved over the frozen ground and his hearing was somewhat impaired.

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, the view of the crossing was obstructed until a

traveler was within 15 or 20 feet of the track, and there was evidence that when driving in a buggy his horse would be within 8 feet of the track before he could get a good view in both directions. The deceased was shown to have stopped, presumably to listen for passing trains, and while he stopped, one train passed going out of the city. Soon after it passed and while its noise was distinct, he drove on and just as he reached the railroad track and while apparently watching the train that had passed he was struck by one of the defendant's trains, which was a transfer not running on any schedule and was running at a high rate of speed. It should be noted that the citation by Mr. Justice Lamar of the case of *Sullivan v. New York, New Haven, and Hartford*, 154 Mass. 524, was an inadvertence, for the case does not support the point to which it was cited. That case was sustained upon a statute of Massachusetts providing that there could be a recovery in such cases unless the injured party was guilty of "gross or wilful negligence." The Massachusetts court decides in the case cited that under the common law there could be no recovery, because the plaintiff was clearly guilty of want of ordinary care, but that such want of ordinary care was not necessarily "gross or wilful negligence" under the statute.

In *Baltimore & Ohio Railroad Co. v. Griffith*, 159 U. S. 603, the evidence showed that the train was several minutes behind time; that as the women approached the place at which a train

could be seen they stopped to look and listen, but neither saw nor heard anything; that after stopping they started driving slowly up the hill to a point 40 or 50 yards from the track and there they stopped again and listened but heard nothing; then they drove slowly down the hill both listening all the time, without talking, and heard nothing; that the view was wholly obstructed by a bank 12 to 18 feet high, and that the bottom of the railroad cut was only 15 feet wide, thus obstructing the view until the horse was about on the rails.

In the case of *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, the deceased was an employe walking across the tracks in the yard on a customary path at night; he was struck by a flat car being pushed in front of a locomotive; the head-light of the locomotive was so arranged that the rays of light passed entirely over the flat car and blinded the eyes of the deceased so he could not see the flat car. The deceased knew nothing of the use of the locomotive and flat car as an appliance for switching purposes.

In *Texas and Pacific Ry. Co. v. Cody*, 166 U. S. 606, the plaintiff was walking along an avenue of a city on a very dark night; as he approached the railroad track he slackened his pace, walked slowly, listened, looked and saw and heard no train; there was no light on the crossing, no bell ringing, no whistle blowing and nothing indicating the approach of a

train; as he passed over the track he was struck by a train backed over the crossing, with no light on the front end of it.

The rule in the state courts will we think be found to be quite uniform when applied to facts like those in this case.

In *Cleveland etc. Railroad Co. v. Elliott*, 28 Ohio St. 340, the view approaching a railroad crossing on highway was obstructed, but at about 60 feet the train could be seen a considerable distance, the court saying;

> "It is, therefore, perfectly clear that at a point somewhere about sixty feet from the track, the train can be seen at a considerable distance. Had Elliott approached the track at this point, which he alleges to have been a 'highly dangerous' one, slowly and cautiously, as a prudent man would have done, had he been walking his horses, as it would have been entirely safe to do, if he was not absolutely certain there was no train in the vicinity, within the space of sixty feet, he might have seen and avoided the danger. Ordinary care would have demanded such degree of caution, from the fact that the train was approaching diagonally behind him. But it appears he drove down hill on a trot, upon the track. He also states that after leaving the summit he did not look or listen for an approaching train until he got on the track, and he first saw the train when he was on the track."

In *Penn. Railroad Co. v. Beale*, 73 Penn. St. 504, 509, the court said:

> "There never was a more important principle setted than that the fact of the failure

> to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court. It was important not so much to railroad companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives, of passengers on trains, and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only but to others."

This was said in a case where there was 10 feet of level ground between the railroad and the hill or bluff from which it was claimed the train might have been seen.

The case of *Schaefert v. Chicago, Milwaukee & St. Paul Ry. Co.*, 62 Iowa, 624, is one where the view was obstructed close up to the track, except that there was a place 4 or 5 rods west of the track where the train could have been seen if the driver had stopped and looked. The court said that under the circumstances ordinary care required that he should have stopped and looked or listened at some place; that there was nothing to prevent him doing so and nothing to distract his attention.

This court in the Schofield case quoted with approval the decision of the Supreme Court of Minnesota in *Brown v. Milwaukee Ry. Co.*, 22 Minn. 165. In that case there was testimony that the deceased had looked at several points before he reached the railroad, and listened for trains as he went along. But the court held that

this furnished no excuse for not looking after he passed the obstructions and when he came to a point near the track where he could have seen.

In *Abbett v. Railway Co.*, 30 Minn. 482, the same court passed on a case where the driver could not see up the track until after he passed a point 30 feet from the railroad. Held; he was guilty of negligence for not looking within this unobstructed space of 30 feet.

In *Mantel v. Railway Co.*, 33 Minn. 62, the plaintiff was a street car driver driving a horse car which crossed the railroad. His view was wholly obstructed until he came within 40 feet of the track. He drove his car to that point on a down grade at about 4 miles an hour with his brake half set; after getting close to the track the train came in sight and he was then not able to stop. The court held that he should either have stopped or had his car under complete control when he came to the place 40 feet from the track where he could see 184 feet up the rails.

In *Haas v. Grand Rapids Railroad Co.*, 47 Mich. 401, where the opinion was by Judge Cooley, the facts were very nearly identical with this case. The railroad crossing the highway at right angles passed through a cut in places 16 feet deep; plaintiff was familiar with the crossing having passed it frequently; the deceased was seen to drive to the track on a slow

trot. Judge Cooley says that to move forward briskly as he did from a point where the view was obstructed and not to pause and look after he passed the obstructions approached nearly to absolute recklessness.

In the case of *Brady v. Railroad Co.*, 81 Mich. 616, the view of the crossing was so obstructed that one could not see an approaching train until he was within 20 or 25 feet, and then could see only a few rods up the track. Plaintiff testified that he listened, approached the track on a walk; looked several times without being able to see a train. But the court held that he should have stopped or looked, or taken some other effective means to protect himself after he reached the point 20 or 25 feet from the crossing where he could see up the track.

In *Nelson v. Railway Co.*, 88 Wis. 392, there was a building 30 feet from the railroad obstructing the view of the crossing, but after the injured party passed this building his view was unobstructed. He did not look up the track for the train until his horses were very close to the rails, so that a collision could not be avoided. The case cannot be distinguished from the case at bar and the court held that the injured party was guilty of negligence as a matter of law.

Another case which cannot be distinguished from this is *Moore Admr. v. Keokuk & Western Ry. Co.*, 89 Iowa, 223. There the highway approached the crossing by a gradual descent until

within 30 or 40 feet of the railroad. When the deceased was within 30 or 40 feet of the crossing he could have seen the approaching train if he had looked, and the train must then have been more than 200 feet distant. The dangerous character of the crossing was known to the deceased and it did not appear that he stopped to see if any train was approaching. According to the undisputed evidence of two witnesses he approached the crossing with his horses on a trot. It was held that he was guilty of negligence as a matter of law.

This case is like *Salter v. Utica and Black River Railroad Co.*, 75 N. Y. 273, in which case a person, approaching a railroad in a cut, at 31 feet from the crossing could have seen up the rail 251½ feet and at 41 feet 203½ feet. He could probably have seen trains for 100 feet before reaching the crossing. At 21 feet from the track, if he had stopped and looked and turned his horses he could have avoided the accident. The case stood without any testimony to show what the deceased actually did, but it was held he was guilty of negligence.

See also *Blackburn v. Southern Pacific Co.*, (Supreme Court Oregon, unreported,) 55 Pac. Rep. 225; *Railway Co. v. Duncan*, 143 Ind. 524; *Railroad Co. v. Hogeland*, 66 Md. 149, 161; *Tully v. Fitchburg Railroad Company*, 134 Mass. 499; *Butterfield v. Western Railroad Corporation*, 10 Allen 532; *Tolman v. Railway Company*, 98 N. Y. 198; *Powell v. Railroad Company*, 109 N. Y. 613.

II.

The court gave the following instruction:

> "If you find under the evidence and instructions of the court that the plaintiffs are entitled to recover damages against the defendants, then in arriving at the amount of such damages you should take into consideration the age of the deceased at the time he was killed, his probable duration of life had such accident not occurred, his mental and physical condition, his abilty to earn money and to support and maintain his wife and children, his ability to care for and protect his wife and children, and to educate and train the latter, and *the loss to the wife and children because of being deprived of the use and comforts of his society* and the loss of his experience, knowledge and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject."

The italicized clause in the foregoing instruction was separately excepted to.

We submit that this instruction introduced an improper element into the measure of damages. The loss to the wife and children by reason of being deprived of the "use and comforts of his society" was not a proper element of damage.

The action is based upon a statute, without which no recovery could be had. The provisions of the statute authorizing recovery, so far as applicable to this case, are as follows:

> "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may main-

> tain an action for damages against the person causing the death. * * * In every such action the jury may give such damages, pecuniary or exemplary, as under the circumstances of the case may to them seem just." (2 Hill's Code, Sec. 138.)

Under the evidence in this case no recovery could be had for vindictive or punitory damages, and the court so instructed the jury. (Transcript, p. 128.)

This statute was considered by the Supreme Court of the state of Washington in the case of *Klepsch v. Donald*, 4 Wash. 436, 444. The decision in that case was that although the statute does not have the limiting clauses of Lord Campbell's Act, which is the parent of all legislation on the subject, still that in a case not calling for exemplary damages the recovery is limited to *pecuniary* loss. The highest court of the state has thus adopted a construction which brings the statute in line with the law of England and of the other states, except in cases of wanton or wilful wrong calling for punitive damages, and this construction is controlling in the federal courts because the cause of action is created by the statute.

The learned Circuit Court of Appeals disposed of this point by saying that the portion of the charge complained of is so connected with the remainder of the instruction, as that it must have been made sufficiently clear to the jury that the loss of the use and comforts of the society of the deceased, which they were allowed

to consider, was the *material use and comfort*, which were akin to the other elements of damage contained in the charge. The court cites and relies on the case of *Pennsylvania Railroad Co. v. Goodman*, 62 Pa. St. 329. But the jury were not told to consider only *pecuniary* loss arising by their being deprived of the use and comforts of his society, and indeed it is difficult to conceive, if they had been so told, how it is possible for loss of society to be a pecuniary loss in any sense.

In the Pennsylvania case which the court relies on the husband sued for loss of his wife, and the jury were told that they could include "*a pecuniary compensation*, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by the accident." Upon this the Pennsylvania court said that the charge was clearly confined to pecuniary compensation in the way of damages, and that the word "companionship" was used to express the relation of the deceased in the character of the services she performed, the court saying: "He (the Judge) merely meant to say that the loss should be measured by the value of her services as a wife or companion."

The services of a wife, being of pecuniary value to the husband, for the loss of which he has a right to recover, it is one thing to speak of pecuniary compensation based on a just estimate of the wife's services and companionship;

but quite another thing when the wife sues for death of her husband to say that she is entitled to damage (not necessarily pecuniary) for the "use and comforts of his society."

It seems to us the jury could have understood but one thing from this charge, and that is that they were not restricted to pecuniary compensation, but could give damages to compensate the wife and children for the loss of the husband and father's society. It is elementary that such elements of damages are improper to be considered. *Blake v. Midland Railway Co.*, 18 Q. B. 93; *Gillard v. Lancashire Railway Co.*, 12 Law Times, 356.

In *Tilley v. Railway Co.*, 24 N. Y. 471, 476, Judge Denio stated the rule which has been almost universally adopted and followed, as follows:

> "The word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value."

The authorities agree that no recovery can be had for loss of society. *Pym. v. Great Northern Ry. Co.*, 4 B. & S. 396; *Telfer v. Northern Railroad Co.*, 30 N. J. L., 188, 199, 210; *Caldwell v. Brown*, 53 Pa. St. 453; *Baltimore & Ohio Railroad Co. v. State*, 63 Md. 135.

The case of *Board of Commissioners of Howard County v. Legg*, 93 Ind. 523, 530-533 contains a very full discussion of the subject. That case we submit was like this in its facts, the charge there considered reading as follows: "Compensation may also be made for the loss of a parent's care and training to the children in their support, education and maintenance, *and the loss by the wife of her husband's companionship.*" The first part of the charge was held to be correct the last clause to be erroneous. The court reviews and explains the case of *Pennsylvania Railroad Co. v. Goodman* as holding that the instruction in that case, when properly construed, authorized the jury to include only the money value of the wife's services and not compensation for the loss of her society. See also *2 Sedgwick on Damages*, 8th. ed., sec. 573; *Railroad Co. v. Barron*, 5 Wall. 90, 105.

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